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No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

AMERADA HESS CORPORATION,

Plaintiff-Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT RESPONSE TO THE COURT'S REQUEST OF OCTOBER 13, 1981

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ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT RESPONSE TO THE COURT'S OCTOBER 13, 1981 REQUEST

On June 10, 1981 the Temporary Emergency Court of Appeals ("TECA") affirmed the District Court's judgment that the anti-passthrough provision found in New York Tax Laws, § 182(12)(a), was preempted by the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. §§ 751-760 ("EPAA"), and the regulations promulgated thereunder. Apdx. 1a-10a. In the final paragraph of its June 10 opinion TECA stated:

> "[w]hen the statute expires in September 1981, it will signal the end of federal concern in this area." Apdx. 10a.

TECA had noted that the Energy Policy and Conservation Act ("EPCA")[1] "expires by its terms on September 30, 1981," citing 15 U.S.C. § 760g. That provision, which is Section 18 of the EPAA as amended by Section 461 of the EPCA, provides in relevant part as follows:

> The authority to promulgate and amend any regulation or to issue any order under this chapter [the EPAA] shall expire at midnight September 30, 1981, but *such expiration shall not affect any action or pending proceedings, administrative, civil or criminal, not finally determined on such date, nor any administrative, civil or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date. Id.* (emphasis added)[2]

On October 13, 1981, the Court, by Alexander L. Stevas, Clerk, requested the parties "to address whether the expiration referred to by the TECA will moot this case, affect the jurisdiction of this Court to review the judgment of the

1. Pub. L. No. 94-163, 89 Stat. 955.

2. The EPCA's provision for the expiration of EPAA price control authority had no effect upon provisions of the EPCA which were unrelated to the EPAA. Thus, the EPCA did not expire on September 30, 1981.

TECA, or otherwise bear on whether the Court should undertake plenary review of that judgment." For the reasons stated below, it is appellees' position that 15 U.S.C. § 760g neither moots this case nor divests this Court of jurisdiction to review TECA's judgment. On the other hand, expiration of the President's authority to promulgate petroleum pricing regulations under the EPAA provides another reason—in addition to those set forth in our Motion to Dismiss or Affirm—why this Court should not undertake plenary review.

ARGUMENT

Appellants and appellees are in apparent agreement that 15 U.S.C. § 760g neither moots this case nor divests this Court of jurisdiction to review TECA's judgment—although appellees submit that no substantial legal questions warranting plenary review are present here.

First, Congress expressly provided in § 760g that the expiration of Presidential price control authority "shall not affect any action or pending proceedings . . . not finally determined on such date." Thus, this Court has not been divested of jurisdiction by virtue of the expiration of Presidential price control authority over petroleum products.

Nor has that expiration mooted this case. As the Court pointed out in *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974), "[t]he starting point for analysis [of mootness questions] is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " That is not so here.

The District Court's judgment, affirmed by TECA, granted appellees dual relief: (1) a declaratory judgment that the anti-passthrough provision was invalid and unenforceable because it was preempted by the EPAA and the regulations promulgated by the President and his delegates pursuant to EPAA authority; and (2) an injunction against

the provision's future enforcement. Assuming *arguendo* that the expiration of the President's EPAA authority has eliminated the basis for an injunction against enforcement for the present period—because, arguably, there is not now a present preemptive conflict between the anti-passthrough provision and federal law—that expiration has *not* eliminated the basis for the District Court's declaration of invalidity.[3] Such a preemptive conflict existed at least until October 1, 1981. That declaration most definitely "affect[s] the rights of litigants" before this Court, since it determines appellees' right to pass through any and all tax liability which has accrued under the New York statute from January 1, 1980 through September 30, 1981. The State has admitted as much in its Jurisdictional Statement (pp. 10-11), and it took the same position in its TECA brief (p. 50). Accordingly, this case is not moot. *See Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 122 (1974).[4]

Moreover, the ultimate result in this action should have a direct effect on appellees' liability for taxes. Certain appellees contend in pending state court actions that one consequence of the preemption of the anti-passthrough provision is that the New York tax was inoperative.[5] While appellants dispute that claim, they recognize that the ultimate outcome in this case will directly affect those pending actions and the substantial rights of the parties, at least until September 30, 1981. Jurisdictional Statement at 12. *See Bank of Marin* v. *England,* 385 U.S. 99, 100-101 (1966).

3. Even under that assumption, the District Court's injunction barring enforcement of the anti-passthrough provision for the period prior to October 1, 1981, remains necessary.

4. In addition, because appellees' complaints alleged alternative grounds having nothing to do with preemption for striking down the anti-passthrough provision, which neither the District Court nor TECA found it necessary to reach (*e.g.* due process, commerce clause and equal protection claims), this case cannot be deemed moot. *See Powell* v. *McCormack,* 395 U.S. 486 (1969).

5. Of course, as the Second Circuit held, the "calculated decision" of New York to link its ability to collect the tax to the continued validity of the anti-passthrough provision does not bring this case within 28 U.S.C. § 1341. *See* Motion to Dismiss or Affirm at 15-17.

While a mere financial dispute—albeit one involving millions of dollars—does not warrant plenary review, it cannot be said that the case is moot as between the parties.

CONCLUSION

At bottom, the only question now before the Court is this: Does this case warrant plenary review, as appellants contend; or, as appellees maintain, should the State's appeal be dismissed and certiorari denied or, alternatively, should TECA's judgment be affirmed without full briefing and argument. Assuming (without conceding) that there is no present preemptive conflict—and that the only remaining issue relates to accrued tax liability under the New York statute—there is even less reason than before for this Court to exercise its discretion in favor of plenary review.

Respectfully submitted,

November 9, 1981

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